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April 9, 2003

VIA Electronic Filing

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: **In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277**
Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket No. 01-317
Definition of Local Markets, MM Docket No. 00-244

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, this letter is to provide notice of an *ex parte* meeting with Commission staff in the above-referenced proceedings. On April 9, 2003, Reverend Robert Chase of the Office of Communication, Inc. of the United Church of Christ (UCC) and Amy Wolverton, Angela Campbell, Chris O'Connell and Petra Smeltzer of Georgetown University Law Center's Institute for Public Representation, on behalf of UCC, met with Mania Baghdadi, Debra Sabourin, Erin Dozier, Robert Ratcliffe, Thomas Tanasovich, Amy Brett, and Julie Salovaara of the Commission's Media Bureau.

During this meeting, representatives of UCC emphasized that the vague, open-ended nature of the NPRM precluded meaningful public participation in the Commission's rulemaking process. Thus, the Commission's adoption of new media ownership rules without more detailed proposals and a further comment period would violate the Administrative Procedure Act. UCC's representatives also urged the Commission to interpret the phrase "necessary in the public

interest" in section 202(h) of the 1996 Telecommunications Act as "useful," "convenient," or "appropriate" as the Commission construed this section in its report regarding section 11 of the same act. A copy of UCC's presentations on these issues was provided at the meeting and is attached to this letter.

Finally, UCC's representatives generally discussed the substance of Comments filed with the Commission January 2, 2003 and Reply Comments filed with the Commission February 3, 2003. Participants emphasized the continuing need for retention of the media broadcast ownership rules, particularly separate local ownership rules for different media, as necessary in the public interest.

Pursuant to the Commission's Rules, this *ex parte* notice is being filed electronically through the Commission's Electronic Comment Filing System procedures. Please do not hesitate to contact me at 202-662-9545 should you have any questions regarding this filing.

Sincerely,

Amy R. Wolverton

Attachment

cc: Chairman Michael Powell (FCC)
Commissioner Kathleen Abernathy (FCC)
Commissioner Jonathan Adelstein (FCC)
Commissioner Michael Copps (FCC)
Commissioner Kevin Martin (FCC)
Paul Gallant (FCC)
Mania Baghdadi (FCC)
Debra Sabourin (FCC)
Erin Dozier (FCC)
Robert Ratcliffe (FCC)
Thomas Tanasovich (FCC)
Amy Brett (FCC)
Julie Salovaara (FCC)
Reverend Robert Chase (UCC)
Angela Campbell (IPR)

Office of Communication of the United Church of Christ, Inc.
2002 Biennial Regulatory Review MB Dkt. No. 02-277
Media Bureau Meeting
April 9, 2003

I. The Commission's adoption of new media ownership rules without release of more detailed proposals and a further notice period would preclude meaningful public participation in violation of the Administrative Procedure Act.

An agency must publish notice of a proposed rule making in the Federal Register that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved" so that the public can meaningfully participate in the rule making process. *See* Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b),(c) (2003); *see also MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1140-41 (D.C. Cir. 1995). Because the Commission's 2002 Biennial Review NPRM does not present sufficient information or detail regarding possible new media ownership rules, the public cannot provide meaningful input. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("*Small Refiner*"). Accordingly, the adoption of any new media ownership rules without further notice will violate the APA.

A. The adoption of a "diversity index" without more specific notice and a further comment period would violate the APA because the public cannot meaningfully comment on a proposal the Commission has failed to disclose in the NPRM.

Press reports indicate the Commission is considering the adoption of a "diversity index" as a "tool" to measure diversity, but the words "diversity index" do not even appear in the NPRM. *See, e.g.* John Spofford, *Ferree Defends FCC Work on Broadcast Flag, Other Topics*, COMM. DAILY, March 10, 2003. As the NPRM includes a multitude of questions and raises countless issues, the public can only speculate about how a "diversity index" would actually function.

Because the Commission has not provided any information on the "diversity index," both consumers and industry are incapable of submitting comments to enhance the quality of the final rule or of advocating alternative approaches more beneficial to the public interest. *See Small Refiner*, 705 F.2d at 547. More detailed notice and a further comment period are also essential to ensure "fairness to affected parties." *Id.* (quoting *National Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982). Depending on how the Commission would apply the "diversity index," its adoption might lead to further consolidation of media outlets, decreasing diversity of ownership and programming and impacting the corporate structure and holdings of media owners of all sizes. Accordingly, the APA requires the Commission to provide a more specific description of the "diversity index" to permit all parties opportunity to comment on rules that could change the way they receive their news or operate their businesses. Finally, adoption of a "diversity index" without further notice would compromise any eventual judicial review. *See Small Refiner*, 705 F.2d at 547. Interested parties need a more detailed

description of the specifics of a "diversity index" in order to collect and submit material highlighting the shortcomings or benefits of such a rule for use in a potential appeal. *Id*.

B. The adoption of a commenter's proposal, such as NAB's 10/10 plan, would also violate the APA because the Commission must provide specific notice of its consideration of a commenter's proposal.

The D.C. Circuit has held that "[as] a general rule, [an agency] must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment." *American Fed'n of Labor and Cong. of Indus. Orgs v. Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985) (quoting *Small Refiner*, 705 F.2d at 549, emphasis in original). Parties cannot be expected to discern which proposals or components of proposals the Commission might integrate into a final plan, and the public and interested entities cannot be expected to evaluate, understand, and comment meaningfully on all submitted proposals. *See Nat'l Mining Ass'n v. Mine Safety and Health Admin.*, 116 F.3d 520, 531-32 (D.C. Cir. 1997). Indeed, the voluminous number and complex nature of many of the proposals precludes meaningful comment on all proposals.

C. The Commission has not even provided sufficient notice to justify the elimination of one or more of the media ownership rules absent release of further proposal details.

Specifically, the Commission has not satisfied its "obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977), *reh'g denied*, 434 U.S. 988 (1977). The media ownership rules are inter-related, and interested parties cannot assess the impact of the repeal of one rule and the retention of another without more explicit explanation of the new possibilities. *See Complex Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 816 (1994).

II. The Federal Communications Commission should interpret the phrase "necessary in the public interest" in section 202(h) of the 1996 Telecommunications Act as "useful," "convenient," or "appropriate."

One of the primary legal issues in the 2002 Biennial Regulatory Review proceeding is the meaning of section 202(h), which requires the Commission to biennially review its media broadcast ownership rules and to determine whether, as a result of competition, these rules are "necessary in the public interest." Section 202(h) then requires the Commission to repeal or modify any rule that the Commission determines to be "no longer in the public interest." The meaning of section 202(h) thus hinges upon the meaning of the phrase "necessary in the public interest."

Similarly, section 11 of the same Act requires the Commission to biennially review all of its telecommunications regulations and to determine whether, as a result of meaningful competition between providers of such service, those regulations are "no longer necessary in the public interest." 47 U.S.C. § 161(a). Section 11 then requires the Commission to "repeal or modify" any regulations that are "no longer necessary in the public interest." *Id.* § 161(b).

In a recent report mandated by section 11, the Commission interpreted the phrase "necessary in the public interest" in that section to mean "useful," "convenient," or "appropriate." *2002 Biennial Regulatory Review, Report*, GC Dkt. No. 02-390, ¶¶ 15-18 (rel. Mar. 14, 2003). Because section 202(h) expressly refers to section 11 and incorporates review of broadcast media ownership rules into the overall regulatory review mandated by section 11, section 202(h) must be read in conjunction with section 11. Thus, the Commission must construe the phrase "necessary in the public interest" as used in section 202(h) to mean "useful," "convenient," or "appropriate," as it did with respect to section 11.

A. Because sections 202(h) and 11 use identical language, they are presumed to have the same meaning.

"Presumptively, identical words used in different parts of the same act are intended to have the same meaning." *See, e.g.*, *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439, 460 (1993) (citations omitted). The words "necessary in the public interest" are used both in section 11 and in section 202(h) of the 1996 Act. Because nothing in the legislative history of the 1996 Act indicates that Congress intended a different meaning, the Commission should apply the same meaning to these words in both sections of the Act.

B. Because the context of the phrase "necessary in the public interest" in section 11 is essentially identical to the context of the same phrase in section 202(h), the Commission should interpret this phrase in section 202(h) in the same manner as in section 11.

"A statute is to be read as a whole . . . since the meaning of statutory language, plain or not, depends on context." *See, e.g.*, *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (citations omitted). Congress intended to establish the same biennial review procedures for telecommunications and for media rules in sections 11 and 202(h). *See* CONF. REPT. 104-458, 104th Cong., at 185 (1995) ("section 11 requires the Commission to [biennially] review all of its regulations . . . and determine whether any of these regulations are no longer in the public interest because competition . . . renders the regulation no longer meaningful"); *see also id.* at 163-64 ("subsection [202](h) directs the Commission to review . . . all of its ownership rules biennially . . . [and] determine whether any of its ownership rules . . . are necessary in the public interest as the result of competition"). If the Commission were to construe these two sections differently, such inconsistent construction would contravene the intent and purpose of the 1996 Act.

C. For the Commission to construe section 202(h)'s biennial review standard differently from its construction of the standard in section 11 would be arbitrary and capricious and not in accordance with law.

When an agency's interpretation of statutory language is inconsistent with the agency's prior pronouncements or with its precedent on a subject, the new interpretation will not be accorded *Chevron* deference. *See, e.g.*, *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n. 20 (1987). *See also Pontchartrain Broadcasting Co., Inc. v. FCC*, 15 F.3d

183, 185 (D.C. Cir. 1994); *King Broadcasting Co. v. FCC*, 860 F.2d 465, 470 (D.C. Cir. 1988). The Commission's section 11 report construing the phrase "necessary in the public interest" as meaning "useful," convenient," or "appropriate" has become the Commission's de facto "prior pronouncement" or precedent on this issue. Departure from this interpretation would likely be invalidated as arbitrary and capricious and as not in accordance with law.

O.C. INC.
A TRADITION OF ADVOCACY

Standing alone at the beginning and sometimes at personal physical risk to its employees and representatives, the Office of Communication of the United Church of Christ, Inc. was the first voice to demand that broadcasters be held accountable and responsible to the public which has entrusted them. With its groundbreaking efforts and landmark legal victories stripping the racist ownership of WLTB TV of its license during the civil rights movement, O.C. Inc.'s tradition of advocacy on behalf of the under-represented and disenfranchised was born. Not before or since has any other single action gone so far as to protect the access of all segments of society to the public airwaves.

Created in 1959 to protect its parent body, the United Church of Christ, from nuisance law suits and other litigation, by broadcast companies, O.C. Inc. has since successfully fought for the rights of people of color and women in the broadcast industry workplace, through EEO rules adopted by the FCC. It has battled to ensure minimum hours of children's programming be broadcast by television stations. It has worked in neighborhoods to educate and help people secure responsible, quality and community-based programming at fair rates from their cable provider. It battled long and hard before the FCC and the courts to preserve the Fairness Doctrine

It has worked with the NAACP and other civil rights groups to force utility companies to promote qualified women and people of color. It supported the effort to spur competition among telephone companies resulting in now lower rates. It has worked in neighborhoods to end electronic redlining.

Today O.C. Inc. continues to work to promote diversity in the marketplace. It works in marginalized neighborhoods to ensure an equal and fair distribution of the newly approved low power FM radio bands which are now being let for license. Today O.C. Inc.'s advocacy has grown to include safeguarding the recent, but never-the-less now basic, right of all to affordable access to computers and the internet and all the knowledge, information and means of personal self expression they offer.

O.C. Inc. It is a legacy of accomplishment on behalf of the public. It is a living advocacy which has literally changed the way America sees itself.